

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT ) FINAL ORDER  
86859-s40J BY USA, DEPARTMENT OF )  
INTERIOR, BUREAU OF LAND MANAGEMENT)

\* \* \* \* \*

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the January 24, 1995, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations listed below Beneficial Water Use Permit 86859-s40J is granted to the United States of America, Department of Interior, Bureau of Land Management to appropriate 886 acre-feet of water from an unnamed tributary of East Fork Battle Creek by means of a dam located in the S½NE¼NW¼ of Section 31, Township 37 North, Range 19 East, in Blaine County. The uses are 1.4 acre-feet of water per year for stock water from May 1 through October 31, inclusive of each year and 884.6 acre-feet of water per year for wildlife and waterfowl from January 1 through December 31, inclusive of each year.

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A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

B. Permittee shall install a release structure which is, at a minimum, 36 inches in diameter.

C. Permittee shall only divert that water which is unappropriated. If, when permittee is diverting water, a call is made by a senior appropriator who can beneficially use the water, Permittee shall cease diverting that water so that it can be used by downstream senior appropriators.

D. Permittee shall install an adequate measuring device and shall keep a written record of the mean monthly inflow and outflow of the reservoir and shall submit said records to the Havre Water Resources Regional Office by November 30 of each year.

E. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.

F. The issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

**NOTICE**

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition


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in the appropriate court within 30 days after service of the Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 28 day of February, 1995.

  
\_\_\_\_\_  
Gary Fritz, Administrator  
Department of Natural Resources  
and Conservation  
Water Resources Division  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 1<sup>st</sup> day of MARCH, 1995 as follows:

James D. Barnum, Area Mgr  
USA (Dept of Interior/  
BLM)  
P.O. Drawer 911  
Havre, MT 59501-0911

David Warburton, Pres.  
Matheson Ditch Co.  
RR1, Box 31394  
Billings, MT 59107-1394

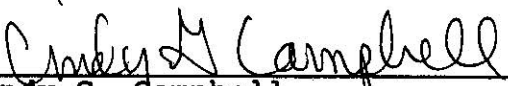
Joe Frazier  
USA (Dept of Interior/  
BLM)  
P.O. Box 1160  
Lewistown, MT 59457

Sever Enkerud, Pres.  
Glasgow Irrigation Dist.  
P.O. Box 271  
Glasgow, MT 59230

John C. Chaffin  
Office of Solicitor  
U.S. Dept of Interior  
P.O. Box 31394  
Billings, MT 59107-1394

Bob Larson, Manager  
Havre Water Resources  
Regional Office  
1708 West 2nd St.  
P.O. Box 1828  
Havre, MT 59501  
(via electronic mail)

Vivian A. Lighthizer,  
Hearing Examiner  
Department of Natural  
Resources & Conservation  
1520 E. 6th Ave.  
Helena, MT 59620-2301

  
Cindy G. Campbell  
Hearings Unit Legal Secretary

\* \* \* \* \*

\* \* \* \* \*

Bob L. Larson, Manager, and Dixie Brough, Water Resources Specialist, both with the Havre Water Resources Regional Office

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of the Department of Natural Resources and Conservation (Department) appeared at the hearing for the Department.

#### EXHIBITS

Applicant offered two exhibits for the record. Both were accepted without objection.

Applicant's Exhibit 1 consists of 13 pages and is U.S. Geological Survey Water-Resources Investigations Report 89-4206 entitled *Streamflow Characteristics of Small Tributaries of Rock Creek, Milk River Basin, Montana, Base Period Water Years 1983-87*.

Applicant's Exhibit 2 is a map approximately 11 inches by 17 inches showing ownership of property around the proposed reservoir. The cross-hatched areas are privately owned property while the clear areas are owned by the United States.

Objector offered one exhibit for the record. This exhibit was accepted without objection.

Objector's Exhibit 1 consists of three pages. The first page is a written statement signed by David Warburton describing, *inter alia*, the points and means of diversion and the period of use of the Matheson Ditch Company. The second page, Exhibit "A" describes the acreage, source of water, use of water and water right of the Matheson Ditch Company. The third page, Exhibit "B" is a map showing, *inter alia*, the Matheson Ditch Company's points of diversion.

### PRELIMINARY MATTERS

During the hearing Objector Matheson Ditch Company withdrew its objection in this matter subject to certain conditions. However, an applicant is not relieved of the duty to present evidence to satisfy Applicant's substantive burden of proof when all parties withdraw their objections.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

### FINDINGS OF FACT

1. Application for Beneficial Water Use Permit 86859-s40J in the name of USA Department of Interior, Bureau of Land Management and signed by James D. Barnum, Area Manager of the Havre BLM Area Office, was filed with the Department on April 4, 1994. (Department file.)

2. Pertinent portions of the application were published in *the Chinook Opinion*, a newspaper of general circulation in the area of the source, on May 11, 1994. Additionally the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the proposed appropriation. Two timely objections were received and Applicant was notified of those objections by a letter from the Department dated July 15, 1994. (Department file.)

3. Applicant proposes to construct a dam on an unnamed tributary to East Fork Battle Creek at a point in the S $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$  of

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Section 31, Township 37 North, Range 19 East, in Blaine County. The construction of this dam would create a reservoir with a capacity of 886 acre-feet. The surface area of the reservoir would be 81.87 acres covering areas in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ , SW $\frac{1}{4}$ SE $\frac{1}{4}$ , E $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  and SW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 30 and the NE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 31, all in Township 37 North, Range 19 East, Blaine County. The proposed uses are 1.4 acre-feet of water for stock and 884.6 acre-feet for wildlife and waterfowl. The proposed period of use for stock water is May 1 through October 31 and the period of use for wildlife and waterfowl is January 1 through December 31, inclusive of each year. The stock water would be siphoned from the reservoir into a pipeline to a tank downstream. (Testimony of Joe Frazier, Mike Montgomery and Department file.)

4. The dam will be constructed according to the federal guidelines for dam safety which are much more stringent than the dam safety guidelines of the state of Montana. The dam would be equipped with a drainage device, a gated outlet equal to or larger than 36 inches in diameter, capable of releasing all the water down to the dead pool storage which is estimated to be 150 acre-feet or 15 feet of depth. The drain can be opened and regulated for the amount of flow as requested for prior rights. (Testimony of Joe Frazier.)

5. Applicant and the Bureau of Reclamation have entered into an agreement which allows Applicant to construct releasable storage reservoirs in the Milk River drainage for the Bureau of Reclamation's call at their desire. In return, Applicant has



permission to construct, on a ratio of six to one, storage anywhere in the Milk River drainage that is approved by the Department. The Bureau of Reclamation may ask BLM to release water from the proposed reservoir at any time of the year down to the dead pool storage for irrigation use in the Milk River Irrigation Project. (Testimony of Joe Frazier.)

6. The drainage above the proposed reservoir will yield approximately 200 to 400 acre-feet per year. Applicant does not expect the reservoir to fill more than one year out of ten, maybe two years out of ten. It is possibly over-designed, but to ensure the long life of the reservoir and to justify the cost, it is designed to prevent frequent use of the natural spillway. (Testimony of Joe Frazier.)

7. The proposed location will occupy approximately six percent of the drainage area available to the nearest downstream users; therefore, it should deplete the water supply by about six percent. Once the East Fork of Battle Creek joins Battle Creek, less than four percent of the drainage available would be captured by the proposed reservoir. At the point where Battle Creek flows into the Milk River, the proposed reservoir would be capturing less than one percent of the water available to the downstream users.

8. Blaine County Conservation District has filed for a water reservation for three reservoir sites in the Battle Creek drainage. None of those reservoir sites which the Board of Natural Resources and Conservation proposes to grant are in the

downstream area from the proposed reservoir. (Testimony of Joe Frazier.)

9. The gauging records made from 1905 to 1992 at the two gauging stations located on the International Boundary in Battle Creek and approximately four miles above the confluence of Battle Creek and the Milk River, were used by Applicant to determine that the amount of water stored by the proposed reservoir would not impact any user until the months of July and August when Battle Creek has such low flows that it cannot satisfy all the demands of the current users. (Testimony of Joe Frazier.)

10. The United States Geological Survey performed, over a period of four years, a study of small tributaries of the Milk River to determine how much of the flow actually reached the Milk River during the year. It determined that snow melt runoff and rainfall probably reached the Milk River during the months of April through June. After that, the proposed reservoir being located approximately 40 miles from the mainstem of the Milk River, it is doubtful that a localized thunderstorm would produce enough runoff to actually reach the Milk River. It would probably take a 25 year storm event to produce enough water to get to the Milk River from that location. (Testimony of Joe Frazier.)

11. The proposed point of diversion, place of storage and place of use are entirely located on land owned by Applicant. (Testimony of Joe Frazier and Applicant's Exhibit 2.)

12. Matheson Ditch Company has five points of diversion. Two are located on Battle Creek and three are on the Milk River. The locations are: NW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$  and NE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 33 and NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ , SE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ , and NW $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 34, Township 33 North, Range 20 East. Approximately 699 acres are irrigated in Sections 27, 28, 33, and 34, all in Township 33 North, Range 20 East. Water is also used for 400 to 600 cattle along Battle Creek and Objector's ditches. The diversion points have a pump at each site, two are flood pumps and three are sprinkler pumps, sufficient in size to irrigate the area under each pump. (Testimony of David Warburton and Objector's Exhibit 1.)

13. There are no planned projects for which a permit has been granted on this source. (Department records.)

14. No valid objections relative to water quality were filed for this application. (Department file.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

#### CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all substantive procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 1 and 2.

2. The proposed uses of water, wildlife, waterfowl, and stock, are beneficial uses of water. See Finding of Fact 3.

3. Applicant has provided a preponderance of evidence that the water rights of a prior appropriator will not be adversely affected. See Findings of Fact 4, 5, 7, 9, 10, and 12.

4. Applicant has proven by a preponderance of evidence there are unappropriated waters in the source of supply at the proposed point of diversion at times when the water can be put to the use proposed and that during the period Applicant seeks to appropriate, water is reasonably available in the amount Applicant seeks to appropriate. See Findings of Fact 6, 9, and 10.

5. Applicant has proven by a preponderance of evidence the proposed means of diversion, construction, and operation of the appropriation works are adequate. See Findings of Fact 3 and 4.

6. Applicant has a possessory interest, or the written consent of the person who has the possessory interest, in the property where the water is to be put to beneficial use. See Finding of Fact 11.

7. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. See Findings of Fact 8 and 13.

8. Applicant is not required to prove no adverse effect to water quality or the ability of a discharge permit holder to satisfy effluent limitations. See Finding of Fact 14.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations listed below Beneficial Water Use Permit 86859-s40J is granted to the United States of America, Department of Interior, Bureau of Land Management to appropriate 886 acre-feet of water from an unnamed tributary of East Fork Battle Creek by means of a dam located in the S $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 31, Township 37 North, Range 19 East, in Blaine County. The uses are 1.4 acre-feet of water per year for stock water from May 1 through October 31, inclusive of each year and 884.6 acre-feet of water per year for wildlife and waterfowl from January 1 through December 31, inclusive of each year.

A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

B. Permittee shall install a release structure which is, at a minimum, 36 inches in diameter.

C. Permittee shall only divert that water which is unappropriated. If, when permittee is diverting water, a call is made by a senior appropriator who can beneficially use the water, Permittee shall cease diverting that water so that it can be used by downstream senior appropriators.

D. Permittee shall install an adequate measuring device and shall keep a written record of the mean monthly inflow and outflow of the reservoir and shall submit said records to the

Havre Water Resources Regional Office by November 30 of each year.

E. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.

F. The issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

#### NOTICE


This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

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**FILED**

Dated this 24<sup>th</sup> day of January, 1995.

  
Vivian A. Lighthizer  
Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 East 6th Avenue  
Helena, Montana 59620  
(406) 444-6615

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 25<sup>th</sup> day of January, 1995, as follows:

James D. Barnum, Area Mgr.  
USA (Dept of Interior/  
BLM)  
P.O. Drawer 911  
Havre, MT 59501-0911

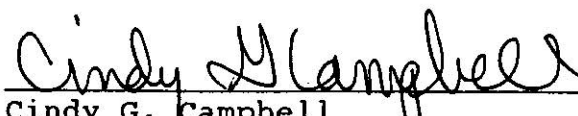
Joe Frazier  
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Cindy G. Campbell  
Hearings Unit Legal Secretary